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No. 06-457

# In the Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF MAINE,

*Petitioner,*

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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### INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including parcel delivery companies, companies whose operations are categorized as less-than-truckload ("LTL"), and companies that primarily haul truckload quantities of freight. ATA regularly advocates the trucking industry's common interests before this Court and other courts. ATA and its members have a strong interest in motor carrier regulations generally, and ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act ("FAAAA") raised in this case because it actively participated in the formulation of federal motor carrier deregulation policy in Congress. See H.R. CONF. REP. NO. 103-677, at 88 (1994), reprinted in 1994 U.S.C.C.A.N. at 1715, 1760.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size. The Chamber's members, including its motor carrier members, operate

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

in every industry sector of the economy, throughout the United States, and around the globe. The Chamber's members rely on parcel delivery companies and other motor carriers to deliver needed raw materials and components and to distribute their products on a timely, efficient, and cost-effective basis. A central function of the Chamber is to represent the interests of its members in important matters before this Court and other courts, Congress, and the Executive Branch. To that end, the Chamber has filed amicus briefs in numerous cases addressing issues of vital concern to the Nation's business community.

The national trucking industry is of massive size and scope and is an essential pillar of the American economy and lifestyle. The U.S. Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") estimates that there are almost 685,000 motor carriers operating in interstate commerce.[2] In 2002, nearly eight billion tons of freight (over 2/3 of domestic tonnage shipped) with a value of over $6 trillion moved by truck.[3] To efficiently and competitively undertake the more than six million estimated daily shipments needed to move this volume of freight, trucking companies need to employ uniform procedures free of individualized state regulatory requirements that impede the free flow of trucking commerce. An overarching federal regulatory network accompanied by strong preemption allows the trucking industry to meet the needs of the American economy.

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[2] U.S. Dep't of Transp., FMCSA, FY2008 Budget Estimates at 4A-9, available at http://www.fmcsa.dot.gov/documents/about/FMCSA-FY-08-Budget-Est.pdf.

[3] U.S. Census Bureau, 2002 Economic Census, 2002 Commodity Flow Survey, tbl.1a (Dec. 2004), available at http://www.census.gov/prod/ec02/ec02tcf-us.pdf.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The FAAA broadly preempts any "law * * * related to a price, route, or service of any motor carrier" or any "air carrier * * * transporting property * * * by motor vehicle." 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A). These preemption provisions were enacted in 1994 with the goal of eliminating the "patchwork" of burdensome state trucking regulations that had developed and to ensure that States would not undo federal deregulation with regulation of their own. To achieve this goal, Congress incorporated the "broad" preemptive language and effect of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), as interpreted by this Court in *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). Accordingly, like the ADA, the FAAAA preempts all laws that expressly reference or significantly affect a price, route, or service of any motor carrier. FAAAA preemption is an essential component of the broader federal policy of uniform regulation of interstate motor carriers, as evidenced by the FAAAA's legislative history and the structure of federal motor carrier regulation as a whole. This policy permits carriers—such as UPS, Federal Express ("FedEx"), DHL, and others—to achieve an efficient and "standard way of doing business" nationwide.

Express carriers' "standard way of doing business"—and the timely, efficient, and cost-effective delivery of packages it enables—is essential not only to the carriers themselves but also to their customers who rely on them and to the economy as a whole. While the "express industry makes a significant direct contribution to the global economy," "[t]he most important role of the express industry is in facilitating the success of other parts of the global economy."[4] Moreover, while the express delivery industry is already "a major element of

[4] Oxford Economic Forecasting, *The Impact of the Express Industry on the Global Economy* at 3 (Mar. 2005), available at http://tinyurl.com/2dg7de.

the transportation infrastructure of the nation" and "essential [to] modern commerce," "current trends suggest that [it] will assume an even more significant role in the future."[5] Among these trends are the ever-increasing sales of online retailers who rely on carriers such as UPS, FedEx, and DHL to provide the timely delivery services their customers demand.[6] Finally, because these carriers not only deliver products to customers but also transport the components of many of the same products during the course of the manufacturing process,[7] any disruptions or price increases caused by a patchwork of state regulations will have a cumulative effect that

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[5] Edward K. Morlok et al., *The Parcel Service Industry in the U.S.: Its Size and Role in Commerce*, at i (Univ. of Penn. 2000), available at http://www.seas.upenn.edu/~morlok/morlokpage/parcel.html; see also, *e.g.*, *id.* at 20-31 (describing the importance of parcel service to the economy); Leslie S. Hough & Maciek Nowak, *The Package Express Industry: A Historical and Current Perspective*, in TRUCKING IN THE AGE OF INFORMATION 77, 77 (Dan Belman & Chelsea White III eds., 2005) ("The package express industry in the United States" "is a central and dynamic element of the world economy, playing a critical role in the rapid movement of freight within an increasingly globalized economy."); cf. Daniel Gross, *UPS v. FedEx; Which Company is Right About the Economy*, SLATE, July 28, 2006, at http://www.slate.com/id/2146636 ("UPS and FedEx both make excellent bellwethers for the stock market as well as the economy at large. They have their fingers on the pulse of trade and services. When the economy is humming, these firms process ever-larger quantities of parcels, envelopes, and boxes.").

[6] *E.g.*, Daniel Gross, *One Word: Logistics; The Unheralded Key to the New Economy*, SLATE, Jan. 20, 2006, at http://www.slate.com/id/2134513.

[7] *E.g.*, *The Impact of the Express Industry on the Global Economy*, *supra* note 4, at 23-25; Morlok et al., *supra* note 5, at 29-30.

ultimately will be borne by consumers and the economy as a whole.[8]

For these reasons, it is of great concern to the U.S. business community that the FAAAA be applied as it is written—as preempting any state law that "relate[s] to" rates, routes, and services, and ***not*** just state laws that directly regulate the same, as petitioner would have it. Anything less than the broad preemptive scope that Congress intended will be insufficient to keep this vital channel of interstate commerce clear and unobstructed.

Under *Morales* and a straightforward reading of the FAAAA's text, the Maine Tobacco Delivery Law is preempted because it both expressly references carriers' services and significantly affects rates, routes, and services by disrupting carriers' standard way of doing business. Petitioner's cramped theory of FAAAA preemption must be rejected because it would expose carriers to precisely the sort of patchwork of state regulations that the statute was intended to eliminate, as each State could adopt its own unique and varying requirements for the delivery of tobacco and anything else deemed "dangerous" or "unhealthy." See Pet.'s Br. at 2. Such inconsistent state regulations not only are preempted by the FAAAA but also are inconsistent with the structure and purposes of federal motor carrier regulation as a whole. See Part IV, *infra*.

Petitioner's arguments notwithstanding, there is no "presumption against preemption" of such burdensome state regulation of a pervasively interstate industry that has been the subject of extensive federal regulation almost from its inception. Nor does the Synar Amendment shield the Maine

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[8] Cf. FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994) (finding that the then-existing patchwork of state regulations had imposed "an unreasonable cost on the American consumers" and an "unreasonable burden on interstate commerce" as a whole).

laws from FAAAA preemption. Without a doubt, States may prohibit tobacco sales to minors and punish retailers who violate the prohibition. What they may ***not*** do, however, is regulate carriers' services and distribution procedures on a varying, state-by-state basis in an effort to conscript them into the policing and enforcement of such laws.

## ARGUMENT

### I. The FAAAA Broadly Protects Carriers Against A Patchwork Of Burdensome State Regulations.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 , Congress has made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. REP. NO. 96-1069, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 2283, 2292; see also, *e.g.*, Michael J. Norton, Note, *The Interstate Commerce Commission and the Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 UTAH L. REV. 709, 709 (reporting that federal motor carrier "regulation has recently come under attack for causing inefficiencies and wastefulness, and for repressing technological advances in the industry"). Thus, in order to remove obstacles to innovation and to encourage efficiency, Congress significantly deregulated the industry at the federal level.

It soon became clear, however, that federal deregulation could not achieve its objectives as long as burdensome and inconsistent state regulation persisted. In 1994, Congress found that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat.

1569, 1605 (1994). Specifically, Congress found that state regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] * * * innovation and technology." H.R. CONF. REP. NO. 103-677, *supra*, at 87. Indeed, despite deregulatory efforts at the federal level, "[t]he sheer diversity of [state] regulatory schemes [remained] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* Therefore, in order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Ibid.*

To achieve its deregulatory goals, Congress purposefully copied the preemptive language of the ADA (*id.* at 83): Like the ADA, the FAAAA preempts any "law * * * related to ***a*** price, route, or service of ***any*** * * * carrier." 49 U.S.C. § 14501(c)(1) (emphasis added); see also *id.* § 41713(b)(4)(A). But see Pet.'s Br. at 18 (asserting that "[t]he preemptive language" Congress selected is, "of course, * * * relatively meaningless"). Further, Congress specifically intended to incorporate "the broad preemption interpretation adopted by [this] Court in *Morales*." H.R. CONF. REP. NO. 103-677, *supra*, at 83; see also *Morales*, 504 U.S. at 383 (these "words * * * express a broad pre-emptive purpose"). Under *Morales*, any state law that expressly references or significantly affects a price, route, or service of any carrier is preempted. 504 U.S. at 388.

## II. The FAAAA Preempts *All* Laws That "Relate[] To" Carriers' Prices, Routes, Or Services.

Contrary to petitioner's arguments, the FAAAA preempts ***all*** laws that "relate[] to a price, route, or service of any * * * carrier," 49 U.S.C. § 14501(c)(1), not just "economic regulations." Petitioner's attempt to separate "economic regulations" from laws governing the delivery of "dangerous" substances or "public health delivery laws" has no basis in the statute itself and would ultimately prove un-

workable. *See* Part III, *infra*. The distinction also misreads one important pre-FAAAA precedent and essentially repackages an argument this Court rejected in *Morales*.

Petitioner cites approvingly the Department of Transportation's testimony that the FAAAA's preemption provision "would codify [*Federal Express Corp.* v. *California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991)], with one major difference"—*i.e.*, it would extend the benefits of federal preemption "to a much broader class of carriers." Pet. Br. at 30 (quoting *State Motor Carrier Laws: Hearing on S. 1491 Before the Subcomm. on Surface Transp. of the H. Comm. on Pub. Works & Transp.*, 103d Cong. (July 20, 1994) (testimony of Frank E. Kruesi, Assistant Secretary, U.S. Department of Transportation), available at 1994 WL 377958). While the Ninth Circuit did refer to "economic" and "non-economic" regulations in the *FedEx* case, it did ***not*** do so in the same sense that petitioner now uses those terms. Rather, the Ninth Circuit reasoned:

> Most of the regulations challenged here are obviously economic—they bear on price. Those regulations which are not patently economic—the rules on claims and bills of lading, for example—relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates.

936 F.2d at 1078.

Thus, the Ninth Circuit recognized that even regulations that were "not patently economic" were still subject to preemption under the statute. And, as a matter of simple logic, if regulations "relate to terms of service," and "[t]erms of service determine cost," then the regulations ultimately "affect the price." This logic plainly supports respondents in this case: The Maine Tobacco Delivery Law's terms of delivery

and package processing requirements could easily be substituted for "bills of lading" in the Ninth Circuit opinion and the outcome would be the same.

Moreover, petitioner's "economic regulation" limitation is reminiscent of one of the arguments this Court rejected in *Morales*. There, the attorneys general argued that the ADA precluded States only from "actually prescribing rates, routes, or services." 504 U.S. at 385. As the Court recognized, this argument would nullify the broad preemptive language used in the ADA (and later in the FAAAA) by "simply read[ing] the words 'relating to' out of the statute." *Ibid.* "Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'" *Ibid.* Just as in *Morales* there was no valid basis for replacing the broad "relating to" with the more narrow "regulate," in this case petitioner identifies no valid basis for replacing any "law"[9] with the amorphous category of "economic regulations."

## III. The Maine Tobacco Delivery Law Expressly References Carriers' Services And Significantly Interferes With Carriers' Processing And Delivery Services.

The Maine Tobacco Delivery Law is preempted under the FAAAA because it both expressly references carriers' services and significantly affects their processing and delivery capabilities—and, by extension, their prices. To begin with, the express purpose of the statute—"***An Act To Regulate the Delivery*** and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors"[10]—is to regulate and impose requirements on carriers' deliveries. And it

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[9] The FAAAA preemption provisions actually use the purposefully broad phrase: "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any * * * carrier." 49 U.S.C. § 14501(c)(1); see *id.* § 41713(b)(4)(A).

[10] 2003 Me. Laws ch. 444 (emphasis added), available at http://www.maine.gov/ag/dynld/documents/pl444.pdf.

should be beyond dispute that delivering packages is a service of package delivery companies such as UPS, FedEx, and DHL. Further, by imputing knowledge of a package's contents based on the identity of the shipper or markings on the package, the Tobacco Delivery Law expressly imposes additional obligations on carriers' distribution operations and deliveries. These express references to and direct regulation of carrier services can and should be the end of the inquiry under *Morales*. See 504 U.S. at 388.

But even beyond the Tobacco Delivery Law's express references to carriers' services, it is also clear that the law has a "forbidden significant effect upon" carriers' rates, routes, and services. *Ibid.* Given the volume of packages they handle on a daily basis, it is something of an understatement to say that the operations of carriers such as UPS, FedEx, and DHL "depend upon an orderly flow of packages." *United Parcel Serv., Inc.* v. *Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003). Indeed, on average, UPS and FedEx alone ship about 20,000,000 packages a day in the United States.[11] "When you handle millions of packages, a minute's delay can cost a fortune[.]" Claudia H. Deutsch, *Still Brown, But Going High Tech*, N.Y. TIMES, July 12, 2007, at C1 (internal quotation marks omitted); see also, *e.g.*, *Fed. Express Corp.*, 936 F.2d at 1077 ("Federal Express guarantees delivery by 10:30 a.m. the day after a package has been picked up. There is a full refund if a package is even one minute late. To keep this schedule, even the most minor delays must be avoided[.]").

These carriers "can only provide timely package delivery if [they] follow[] uniform procedures" for processing and delivering packages (Pet. App. 28), and all have therefore invested billions of dollars in developing, standardizing, and

[11] See FedEx, 2007 Annual Report at 40, 42, available at http://tinyurl.com/2hj4h6; UPS 2006 Annual Report, Form 10-K, at 20, available at http://tinyurl.com/2c4564.

fine-tuning their processes (*e.g.*, Deutsch, *supra*). The result is "a science that many companies aspire to: uniform business processes * * * worldwide * * * and a detailed plan of how products move through the pipeline." Jennifer Baljko Shah, *FedEx's Hub of Supply Chain Activity*, ELECTRONIC BUYERS' NEWS, May 10, 2001, available at http://tinyurl.com /3a5b22. Uniformity begins at the "hub"[12] and extends outward, establishing consistent practices and procedures for pickups and deliveries worldwide.

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[12] For a description of UPS's hub in Louisville, Kentucky, see JOHN MCPHEE, UNCOMMON CARRIERS 163-84 (2006), originally published as *Out in the Sort: Lobsters, Bats, and Bentleys in the UPS Hub*, THE NEW YORKER, Apr. 18, 2005, at 161. As McPhee describes:

> If no problem develops along the way, a standard six-sided package going through the hub will be touched twice by human beings: as it is unloaded on entry and as it is loaded into a can after its trip through what the UPS workers universally call "the sort." Some five thousand workers come nightly to the sort, but few of them ever touch a package, which is largely what the hub is about, as it carries automation off the scale of comprehension.

UNCOMMON CARRIERS at 164. "The sort" consists of "[a] hundred and twenty-two miles of belts and monorails" packed into a space "a scant half-mile long." *Id.* at 165-66. A package entering "the sort" typically arrives at the airplane headed for its destination in about eight to ten minutes, having traveled at least two miles in the process. *Id.* at 163, 165-68.

FedEx's "World Hub" or "Memphis Super Hub" in Memphis, Tennessee, similarly utilizes three hundred miles of conveyor belts to process 3.3 million packages a day. *See* FedEx Newsroom, World Hub, at http://news.van.fedex.com/taxonomy/term/1056. DHL's U.S. hub, with 7,000 employees supporting 115 aircraft, is in Wilmington, Ohio. *See* Deutsche Post World Net, *Cleared for Take-Off*, at http://www.dpwn.de/dpwn?skin=hi&check=yes&lang =de_EN&xmlFile=2007711.

State laws such as the Maine Tobacco Delivery Law threaten to disrupt this uniformity by imposing on carriers delivery requirements and policing and investigative responsibilities that vary from State to State. For example, while Maine statutes apply to all tobacco products, laws in Alaska, Connecticut, Louisiana, New York, Texas, Virginia, and Washington apply to cigarettes only.[13]

The diversity of state-law signature and identification-check requirements are particularly burdensome for "national and regional carriers attempting to conduct a standard way of doing business" (H.R. CONF. REP. NO. 103-677, *supra*, at 87). The Maine Tobacco Delivery Law requires carriers (i) to confirm that the purchaser and the addressee are one and the same, (ii) to confirm that the purchaser/addressee is at least eighteen years old, including checking government-issued identification, and (iii) to obtain the purchaser/addressee's signature. 22 ME. REV. STAT. § 1553(C). In contrast, Arizona and Indiana permit delivery to any adult designated by the purchaser,[14] Delaware and Oklahoma permit delivery to any adult residing at the purchaser's address,[15] and Nevada and West Virginia permit any adult to accept delivery.[16]

Finally, the Maine Tobacco Delivery Law obligates carriers to cross-reference all packages destined for delivery in the State against a list of known unlicensed tobacco retailers

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[13] ALASKA STAT. § 43.50.105(c); CONN. GEN. STAT. § 12-285c; LA. REV. STAT. ANN. §47:871-:878; N.Y. PUB. HEALTH LAW § 1399-ll(2); TEX. HEALTH & SAFETY CODE ANN. § 161.451; VA. CODE ANN. § 18.2-246.7; WASH. REV. CODE § 70.155.105(4)(b).

[14] ARIZ. REV. STAT. § 42-3225(A)(2); IND. CODE ANN. § 24-3-5-5(a)(1)(A).

[15] 30 DEL. CODE ANN. § 5365(a)(2); 68 OKLA. STAT. § 317.4(A)(2)(a).

[16] NEV. REV. STAT. § 202.24935(2), amended by 2007 Nev. Laws ch. 434, § 42 (clerical amendment); W. VA. CODE ANN. § 16-9E-4(a)(2).

provided by the Maine Attorney General. 22 ME. REV. STAT. § 1555(D). The lists contains hundreds of web addresses, e-mail addresses, physical addresses, names, and telephone numbers of such unlicensed retailers.[17] Obligating carriers to check all shippers against such a lengthy list, presumably subject to continuous revision by the State, inevitably would have a significant effect on carriers' services "by forcing [them] to change [their] uniform package-processing procedures." Pet. App. 28. Moreover, significant interference with carriers' uniform practices would, just as Congress feared (see *supra* pages 6-7), increase costs and, by extension, increase the rates paid by consumers.

While the Maine Tobacco Delivery Law would thus significantly affect carriers' services and rates even in isolation, its effects are only the tip of the iceberg under petitioner's limited concept of FAAAA preemption. To begin with, under petitioner's approach, ***every*** State could regulate tobacco deliveries, each imposing a different checklist of delivery requirements and distributing its own unique "do not ship" list. Inconsistencies have already developed to some extent and would certainly accelerate if this Court were to reverse the decision below. Therefore, the effect of the Maine law must be evaluated not only with regard to its direct consequences but also by considering the likely impact if some or all other States were to enact similar but varying regulatory regimes.[18]

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[17] See State of Maine, Office of the Atty. Gen., Tobacco Delivery Compliance Page, at http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 9, 2007). Although the Attorney General's website states that the list of unlicensed retailers is "confidential," citing 22 ME. REV. STAT. § 1555(D)(1), the 36-page list is posted on its website.

[18] See, *e.g.*, *Morales*, 504 U.S. at 389 ("Since taxes and surcharges vary from State to State, the requirement that advertised fares include those charges forces the airlines to create different ads in each market."); cf. *Healy* v. *The Beer Inst.*, 491 U.S. 324,

Moreover, the significant potential effect of numerous and varying state tobacco delivery laws is still only a small part of the story because there is no logical or statutory basis for limiting petitioner's arguments to tobacco. Rather, petitioner argues that the FAAAA contains an implied exception authorizing States to regulate the delivery of an undefined category of "dangerous substances" so long as they are captioned as "public health laws." Pet.'s Br. at, *e.g.*, i, 2-3, 18, 22, 30, 34, 37, 42, 48. It is not unduly speculative to posit that, if given the opportunity, at least some States (or even individual cities) would expand this category to include CDs or DVDs,[19] video games,[20] unhealthy or politically incorrect foods,[21] books,[22] diet aids,[23] herbal remedies,[24] or even cloth-

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336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

[19] Cf., *e.g.*, *Tipper Gore Widens War on Rock*, N.Y. TIMES, Jan. 4, 1988, at C18.

[20] Cf., *e.g.*, *Am. Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572 (7th Cir. 2001) (invalidating an Indianapolis ordinance that sought to limit the access of minors to video games that depict violence); Alex Pham, *Video Games; Marathon Sessions Take Over Players: Is That Sick?*, L.A. TIMES, June 22, 2007, at C1 (noting that some doctors are lobbying the American Medical Association to designate "video game addiction" as a "formal medical condition").

[21] Cf., *e.g.* John Stossel, *Trans Fat Ban is "Nanny State" Intrusion*, ABCNEWS.com, Dec. 6, 2006, at http://abcnews.go.com/2020/story?id=2705411&page=1; AP, *Angry Chefs Cook Up Lawsuit Over Foie Gras Ban*, Aug. 22, 2006, available at http://www.msnbc.msn.com/id/14472971/.

[22] Cf., *e.g.*, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 856-58 (1982).

ing.[25] Indeed, in an attempt to police identity theft, a State might exercise its "police power" to require carriers to check identification for ***all*** consumer deliveries, deliver only to the purchaser, and/or cross-check addresses against a list of known identity thieves. Given that petitioner's theory logically would support all of these categories of regulation, their potential effects must also be considered.

In short, if States are allowed to regulate the delivery of anything they deem "dangerous" or "unhealthy," varying regulatory regimes imposing different delivery requirements and "unlicensed retailer" lists for various products will quickly create the sort of "patchwork" system the FAAAA was intended to avoid.[26] "The sheer diversity of [such] regulatory schemes [would once again become] a huge problem

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[23] Cf., *e.g.*, Mayo Clinic, *Weight-Loss Pills: What Can Diet Aids Do For You?* (warning that some popular weight-loss pills "are downright dangerous"), at http://www.mayoclinic.com/health/weight-loss/HQ01160.

[24] Cf., *e.g.*, Justin Gillis, *Herbal Remedies Turn Deadly for Patients*, WASH. POST, Sept. 5, 2004, at A01 ("dangerous herbal remedies can be hyped on the Internet").

[25] Cf., *e.g.*, Greg Bluestein, *Atlanta Baggy-Pants Ban Debate Drags On*, ABCNEWS.com, Aug. 22, 2007, available at http://abcnews.go.com/US/wireStory?id=3534917.

[26] Petitioner and his *amici* cite various existing state statutes that they believe are not preempted by the FAAAA. Pet. Br. at nn.36-37 and accompanying text; Br. of California et al. at 16 & nn.12-17 and 18-19 & nn.18-24. Many of these statutes simply prohibit the knowing transportation of one commodity or another and do not include burdensome signature/identification requirements or obligations to cross-reference packages against lengthy "unlicensed retailer" lists. *E.g.*, 17-A ME. REV. STAT. § 1001(1); N.Y. AGRIC. & MKTS. LAW § 96-z-11; ARIZ. REV. STAT. ANN. § 13-3502. Such statutes are therefore akin to the general prohibition on "knowing transportation" upheld below and not at issue here. Pet. App. 26.

for national and regional carriers attempting to conduct a standard way of doing business." H.R. CONF. REP. NO. 103-677, *supra*, at 87. Accordingly, in addition to expressly referencing carriers' services, the Maine Tobacco Delivery Law is preempted because it would have a "forbidden significant effect upon fares." *Morales*, 504 U.S. at 388.

## IV. The Structure Of Federal Motor Carrier Regulation As A Whole Confirms That There Is No "Dangerous Substances" Exception To FAAAA Preemption.

Petitioner's attempt to create an unenumerated "dangerous substances" exception to FAAAA preemption is also inconsistent with the Act's specifically enumerated exceptions and the structure of federal motor carrier regulation as a whole. The FAAAA specifically provides that it does not preempt:

> [i] the safety regulatory authority of a State with respect to motor vehicles, [ii] the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or [iii] the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B).

However, consistent with the underlying goal of facilitating interstate commerce and promoting efficiency through uniformity, each of these "saved" areas is subject to a separate federal regulatory scheme—each with its own preemptive effect. For example, the Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832, provides for review by the Secretary of Transportation (the "Secretary") of state laws and regulations concerning commercial motor vehicle safety. 49 U.S.C. § 31141(a)-(b). The Secretary is empowered to declare any such state law preempted if he de-

termines that it is more stringent than the federal law and has "no safety benefit," is "incompatible" with federal law, or "would cause an unreasonable burden on interstate commerce." *Id.* § 31141(c)(4).[27] As this Court has recognized, the power to review and preempt state safety laws "affords the Secretary * * * a means to prevent the safety exception [to FAAAA preemption] from overwhelming [Congress's] deregulatory purpose." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002). "Under this authority, the Secretary can invalidate local safety regulations upon finding that their content or multiplicity threatens to clog the avenues of commerce." *Id.* at 441-42.

With respect to highway route controls based on vehicle size and weight, under the Surface Transportation Assistance Act of 1982 ("STAA"), Pub. L. No. 97-424, 96 Stat. 2097 (1983), state law must conform to federal guidelines concerning vehicle length (49 U.S.C. § 31111), vehicle width (*id.* § 31113), and vehicle weight (23 U.S.C. § 127). In addition, States may not unreasonably limit the access of motor carriers traveling on the federal highway system to off-highway terminals; food, fuel, and rest facilities; and points of loading and unloading. 49 U.S.C. § 31114. "One of the main purposes of Congress in passing the STAA was to enhance interstate commerce" and "improve the productivity of truckers by establishing more uniform weight and length limits on federal roads across the country." *Nat'l Freight, Inc.* v. *Lar-*

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[27] Additionally, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-404, 96 Stat. 2097, 2154-2157, authorized the Motor Carrier Safety Assistance Program ("MCSAP"). Under MCSAP, the Secretary is directed to prescribe guidelines and standards "for ensuring compatibility of intrastate commercial motor vehicle safety laws" with federal laws. 49 U.S.C. § 31104(h). Congress directed that the guidelines and standards shall be flexible, "while ensuring the degree of uniformity that will not diminish transportation safety." *Id.*

*son*, 760 F.2d 499, 506-07 (3d Cir. 1985); see also *United States* v. *Connecticut*, 566 F. Supp. 571, 576 (D. Conn.) (Cabranes, J.) ("[I]t is manifest that the STAA reflects a congressional interest in establishing uniform regulations governing the size, weight, and arrangements of trucks used in interstate commerce."), aff'd mem., 742 F.2d 1443 (2d Cir. 1983), aff'd mem., 465 U.S. 1014 (1984).

State route controls based on the "hazardous nature of * * * cargo" are also subject to a pre-existing federal regulatory scheme that promotes uniformity. The Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"), Pub. L. No. 101-615, 104 Stat. 3244 (1990), authorizes the Secretary to establish standards and guidelines for state laws governing the highway routing of hazardous materials. 49 U.S.C. § 5112. Such laws can be enforced only if they comply with the Secretary's standards, and directly affected parties may apply to the Secretary for a determination as to whether a state law is compliant or preempted. *Id.* § 5125(c)-(d). Thus, yet again, "uniformity was the linchpin in the design of the statute." *Colo. Pub. Utils. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).[28]

With respect to the final exception to FAAAA preemption, Congress recently created the Uniform Carrier Registration System ("UCRS") to act as a clearinghouse and depository for, *inter alia*, proof of insurance and financial responsibility so that interstate motor carriers would not be subject to

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[28] See also, *e.g.*, HMTUSA, *supra*, § 2, 104 Stat. at 3245 (finding that state and local laws were "creating the potential for * * * confounding * * * carriers which attempt to comply with [their] multiple and conflicting * * * requirements"); S. REP. NO. 93-1192 at 37 (1974) (noting that the prior version of the statute was intended "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation").

the varying requirements of individual States.[29] The UCRS replaces and improves upon the former "Single-State Registration System," which required interstate motor carriers to register with one State and provided that such "single State registration" would be deemed to satisfy the registration requirements of all other States (see *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 n.* (2002)).

Thus, in each case in which Congress specifically exempted a category of state laws from FAAAA preemption, it did so with the understanding that a separate federal statute would act as a preemptive check on any burdensome state regulation and thereby provide the necessary degree of uniformity. See, *e.g.*, *Ours Garage*, 536 U.S. at 441. Moreover, the comprehensive federal regulatory structure these statutes create demonstrates an overriding federal policy of uniform, national regulation of the industry. Even where States have retained a role, they have done so within limits and subject to federal preemption. There are no loose ends that would allow States to exercise unfettered regulatory discretion over some aspect of the industry. Yet that is precisely what petitioner seeks. Given that Congress expressly saved state laws from FAAAA preemption only where another federal statute already filled the preemptive void, it is simply implausible that it *sub silentio* intended to save an undefined category of "dangerous substances" laws without a similar federal backstop in place.

## V. There Is No "Presumption Against Preemption" When A State Attempts To Regulate In An Area That Is Historically A Subject Of Federal Regulation.

Contrary to petitioner's argument (Pet. Br. at 25), there is no "presumption against preemption" when, as in this case,

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[29] The Uniform Carrier Registration Act of 2005 was part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or "SAFETEA-LU." See Pub. L. No. 109-59, §§ 4301-08, 114 Stat. 1144, 1761-74 (2005).

"the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108. In other words, when a State extends its "police power" into an area of traditional federal concern—rather than vice versa—any such benefit of the doubt disappears. That is precisely what occurred here: The trucking industry has long been a subject of extensive federal regulation, and the Maine Tobacco Law has ventured well beyond the State's core police power to directly regulate motor carriers' services and thereby disrupt federal regulatory policy.

Indeed, almost from its inception, the trucking industry has been the subject of significant federal regulation. As intra- and inter-city roads improved in the early 1900s, the trucking industry became a viable competitor to the railroads. *See* WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940, at 14 (1985). In order to fend off this competition, the railroads successfully lobbied for state regulation of motor carriers. *See* LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATION, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION 44 (1994); Thomas Gale Moore, *Unfinished Business in Motor Carrier Deregulation*, 14 REGULATION No. 3 (1991), available at http://www.cato.org/pubs/regulation/regv14n3/reg14n3-moore.html. In a series of cases in the mid-1920s, however, this Court held that state regulation of interstate motor carriers beyond general and reasonable highway safety legislation was "forbidden by the commerce clause." *Buck* v. *Kuykendall*, 267 U.S. 307, 316 (1925); accord, *e.g.*, *Mich. Pub. Utils. Comm'n* v. *Duke*, 266 U.S. 570, 576-78 (1925); *George W. Bush & Sons Co.* v. *Maloy*, 267 U.S. 317, 324-25 (1925).

In an attempt to fill the gap created by this Court's invalidation of state regulations of interstate carriers, the first proposal in Congress for federal motor carrier regulation was introduced in 1925. *See* ROTHENBERG, *supra*, at 45. Federal regulation first began to take hold with the passage of the Na-

tional Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), and a brief period of federally sponsored self-regulation under the auspices of the National Recovery Administration. However, self-regulation proved generally unworkable and ultimately was held unconstitutional by this Court. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

Finally, these events led to passage of the Motor Carrier Act of 1935 (the "1935 Act"), Pub. L. No. 74-255, 49 Stat. 543 (1935). The 1935 Act brought about comprehensive federal regulation of the motor carrier industry by giving the Interstate Commerce Commission broad regulatory control over, among other things, motor carrier rates, routes, and services. This comprehensive regulatory scheme remained virtually unchanged until Congress began deregulating the industry with passage of the Motor Carrier Act of 1980. *See* Part I, *supra*.

Against this backdrop, petitioner tries to back away from this realm "of significant federal presence" (*Locke*, 529 U.S. at 108) by casting the challenged provisions of the Maine Tobacco Delivery Law as mere "public health" measures, not motor carrier regulations. But whatever their ***purpose***, the undeniable ***subject*** of these provisions is the delivery of packages by motor carriers covered by the FAAAA. See generally *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-07 (1992). The remainder of Maine's statutory framework for addressing the issue of smoking is not being challenged. Rather, the challenge is limited to those provisions of the law that relate directly to carriers' operations, services, and deliveries. These provisions are not immunized from preemption simply because they were enacted together with others that have nothing to do with carriers.

Moreover, invoking an artificial interpretive presumption is unnecessary and unhelpful in a case such as this, which does not turn on notions of obstacle preemption or conflict preemption. Congress not only made clear that state

laws relating to carriers' rates, routes, and services are preempted but also incorporated by reference specific case law from this Court. Given that Congress's intent to preempt state law is clear, there is simply no basis for giving the FAAAA an artificially narrow reading. Rather, because the Supremacy Clause provides that federal law "shall be the supreme Law of the land, * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (U.S. CONST. art. IV, cl. 2), the FAAAA's express preemption provisions should be given their natural meaning, and state laws "to the Contrary" should be disregarded, as the Constitution requires. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234-46, 254-60, 290-303 (2002).

## VI. Congress Has Not Endorsed Or Approved The Maine Tobacco Delivery Law.

Petitioner also argues that the Synar Amendment, Pub. L. No. 102-321, tit. II, § 202, 106 Stat. 323, 394 (1992), authorizes the Maine Tobacco Delivery Law. See Pet.'s Br. 3-4, 19, 37-40. Neither the Synar Amendment nor its implementing regulations, however, have anything to say on the subject of motor carrier regulation or regulation of internet sales of tobacco. See 42 U.S.C. 300x-26; 45 C.F.R. § 96.130. Indeed, they do not confer any new power on the States but rather simply offer federal funds in return for enacting and enforcing youth smoking laws and achieving certain benchmarks. Moreover, nothing in the federal grant program implies that state laws are saved from preemption under other federal statutes simply because they are enacted in pursuit of federal funds. Petitioner's argument that the Maine Tobacco Delivery Law and the HHS grant program share a "common purpose" (Pet.'s Br. at 25) thus ignores the fact that the Maine law is at cross-purposes with the FAAAA. Put simply, the State is not free to ignore federal law simply because it is pursuing ***some*** other objective that the federal government generally supports.

Congress is certainly aware of the issues that the Maine Tobacco Delivery Law seeks to address. For example, the Tobacco Free Internet for Kids Act of 2003 (H.R. 3047), the Internet Tobacco Sales Enforcement Act (H.R. 2824), and the Prevent All Cigarette Trafficking Act ("PACT Act") (S. 1177) were all introduced during the 108th Congress. The PACT Act was reintroduced in the 109th Congress (S. 3810) and is currently pending in the 110th Congress (S. 1027). Although none of these bills has yet become law, their introduction confirms that Congress can regulate in this area should it deem it appropriate to do so. And, more important, only Congress can regulate in a manner that ensures that any new obligations imposed on the motor carrier industry are consistent with the whole of federal motor carrier regulation and are uniform nationwide.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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